

MONTE C. THOMAS
Claimant

MASTER AIR CONTROL, INC.
Respondent

FEDERATED MUTUAL INSURANCE CARRIER CO.)
Insurance Carrier)

ISSUES

The respondent challenges the Administrative Law Judge's finding that claimant's work-related accidental injuries have rendered him permanently and totally disabled as defined in K.S.A. 1992 Supp. 44-510c(a)(2). Respondent contends claimant is capable of working and, therefore, he is limited to permanent partial disability benefits based on a work disability as defined in K.S.A. 1992 Supp. 44-510e(a).

As a result of the accident, claimant also filed a civil lawsuit against two defendant corporations alleging those corporations manufactured or rented to the respondent defective scaffolding that caused claimant's injuries. Claimant settled the civil lawsuit for the sum of \$35,000 for loss of consortium and loss of services to his wife. Respondent claims it is entitled to this settlement amount as a credit against the award because the claimant and the defendants engaged in collusion designed to deprive respondent of its K.S.A. 44-504(b) subrogation interest.

Claimant, on the other hand, contends he suffered serious disabling work-related injuries when he fell from the scaffolding while working for the respondent. Those severe disabling injuries have left him permanently and totally incapable of engaging in any type of substantial gainful employment.

Claimant further contends the respondent is not entitled to the civil lawsuit settlement because the recover for loss of consortium and loss of services to a spouse is excluded from the respondent's subrogation interest. See K.S.A. 44-504(b).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

Nature and Extent of Disability

The Appeals Board concludes the Administrative Law Judge's Award finding that claimant is permanently and totally disabled should be affirmed.

On June 21, 1993, claimant was severely injured when the scaffolding he was working on collapsed. Claimant fell some 12 to 15 feet to the ground. At the time of the accident, claimant was 49 years of age and had been employed by the respondent as a service man since April of 1993.

Claimant was treated for his severe injuries at Wesley Medical Center in Wichita, Kansas. He was initially treated by orthopedic surgeon Robert Eyster, M.D. Dr. Eyster diagnosed claimant with a L1 burst fracture, a cerebral concussion, and fracture of the 6th, 7th, and 8th ribs on the right. After claimant stabilized, Dr. Eyster, on June 25, 1993, performed an open reduction and internal fixation of the L1 burst fracture. He also performed a T12-L2 fusion using CD rods.

After surgery, claimant progressed through a physical rehabilitation program and completed a work hardening program. Claimant regained the ability to walk without a cane but did so by shuffling his feet instead of lifting them. Additional residual conditions were slurred speech, memory loss, and constant headaches.

On December 17, 1993, claimant was referred for a neuropsychological evaluation to C. William Alexander, Ph.D., a clinical psychologist. Dr. Alexander's psychological diagnosis was dementia, psychological function affecting physical condition, and adjustment disorder with mixed emotional features. He found claimant suffered from pain associated with his physical injuries and demonstrated psychological symptoms of anxiety, depression, and changes in cognition as a result of brain trauma. He recommended that claimant participate in a pain management program and other programs designed to address claimant's psychological and cognitive problems.

Dr. Alexander treated claimant for those disorders until June of 1996 when respondent's insurance carrier deauthorized treatment. Dr. Alexander was again authorized to treat claimant on May 9, 1997. The doctor, on the date of his deposition, September 9, 1997, was treating claimant's psychological and cognitive problems.

Dr. Alexander attributed all of claimant's psychological and cognitive problems to the June 21, 1993, work accident. The cognitive problems were related to the brain trauma and the psychological problems were directly related to claimant's physical injuries. The doctor further opined that claimant was permanently and totally disabled, and claimant would never support himself again through competitive employment.

Claimant's overall physical and psychological condition began to deteriorate in 1994, and he was not making any improvement on August 11, 1997, the date of the regular hearing. In addition to the psychological problems described by Dr. Alexander, claimant suffered from a long list of physical disorders. Some of those disorders were bladder and bowel incontinence, headaches, dizziness, balance, seizures, muscle spasms, labored speech, and palsy-like involuntary movements in his neck, shoulders, and arms. For those various physical problems, claimant had seen numerous physicians in various specialties such as physical medicine, neurology, ophthalmology, and orthopedics.

Claimant's overall physical management is presently in the hands of a family physician, Kernie W. Binyon, M.D. Dr. Binyon began treating claimant on March 21, 1996. Dr. Binyon has claimant in a physical therapy program and supervises the numerous medications claimant has to take for his various problems. During Dr. Binyon's deposition testimony on September 2, 1997, he described claimant's current physical condition as being able to walk short distances without assistance. After about a block, Dr. Binyon testified, claimant has extreme pain in his legs and back. Claimant continues to have a marked problem with his memory. Claimant also continues to have headaches and has spastic involuntary body movements which are getting more pronounced. Claimant's vision remains blurred and his incontinence problems persist.

Dr. Binyon opined claimant is permanently and totally disabled from any gainful employment. The doctor does not think claimant can work even part-time. Dr. Binyon believes claimant's condition could deteriorate to the point he would need total nursing care.

Orthopedic surgeon Robert A. Rawcliffe, Jr., M.D., examined and evaluated claimant at claimant's attorney's request on March 13, 1997. Dr. Rawcliffe limited his evaluation and opinions only to claimant's orthopedic problems resulting from the L1 compression burst fracture. Dr. Rawcliffe, in accordance with the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, opined claimant had a permanent functional impairment rating of 10 percent of the body as a whole. He restricted claimant to light category of work or no lifting of more than 20 pounds occasionally, 10 pounds frequently, and avoid bending, crouching, or stooping. Dr. Rawcliffe also believed claimant was in need of additional psychological care and treatment.

Respondent had vocational expert Karen Terrill evaluate claimant on the issue of claimant's ability to perform work and earn wages in the open labor market. The work disability test in effect on claimant's date of accident, June 21, 1993, consisted of those two components. See K.S.A. 1992 Supp. 44-510e(a). Utilizing only Dr. Rawcliffe's orthopedic restrictions of the light work category, Ms. Terrill believed claimant had a 59 percent labor market loss and a 50 percent wage loss for a work disability of 54.5 percent. On cross-examination by claimant's attorney, Ms. Terrill admitted she had not taken into consideration any of claimant's other physical or psychological problems when she arrived at those opinions.

The record contains a videotape of claimant testifying at the regular hearing. Therefore, the Appeals Board also had the opportunity to observe the claimant testify. As described through the testimonies of claimant's wife, Dr. Binyon, and Dr. Alexander; the Appeals Board also observed claimant's involuntary spastic movements of the head and shoulders and the difficulty he had expressing himself verbally.

The Appeals Board finds, as described above, the record supports the finding that claimant's work-related accident caused claimant severe disabling physical injuries. Those physical injuries, coupled with the psychological problems that arose out of the physical injuries, have rendered claimant completely and permanently incapable of engaging in substantial gainful employment. Respondent argues claimant's ability to work should only be based on his orthopedic injuries. The Appeals Board rejects this argument and concludes the claimant also suffers residual injuries from brain trauma and psychological injuries arising from the severe physical injuries. Additionally, respondent argues claimant failed to prove the deterioration of his condition following his accident was caused or contributed by the work accident. The Appeals Board rejects this argument and finds the greater weight of the evidence proves claimant was in good physical and mental health before the accident. After the accident, claimant suffers severe physical and psychological

problems and the evidence supports the conclusion that those problems are related to the June 21, 1993, accident at work.

Is respondent subrogated to the settlement proceeds claimant received for loss of consortium to his wife obtained in a civil lawsuit against third party defendants?

Claimant filed, in 1995, a claim for civil damages against two defendant corporations alleging those corporations manufactured or rented to the respondent defective scaffolding that caused claimant's injury. On October 31, 1996, the District Court of Sedgwick County, Kansas approved a settlement between the claimant and the third party defendants. The settlement amount was \$35,000 and such amount was designated in the journal entry signed by the district court judge, and approved by the parties as loss of consortium and loss of services sustained by claimant's wife. Furthermore, the journal entry included as a matter of law that none of the settlement was subject to the employer's subrogation interests or the workers compensation lien contained in K.S.A. 44-504(b).

Pursuant to K.S.A. 44-504(b), the employer is subrogated and has a lien on the entire recovery a claimant receives against a third party to the extent of the compensation and medical aid provided by the employer under the workers compensation act. Excluded, however, from any such recovery is any amount determined by the court to be loss of consortium or loss of services to a spouse. The employer is required to receive notice of the action, has a right to intervene, and may participate in the action.

Although the settlement journal entry designated the settlement amount for loss of consortium and such journal entry was approved by the district court judge, the respondent claims the claimant and the defendants engaged in collusion designed to deprive respondent of its subrogation interest as required by K.S.A. 44-504(b). Respondent, therefore, requested the Appeals Board to find the respondent was entitled for a credit against the award in this case in the full amount of the \$35,000 settlement.

The Administrative Law Judge found respondent was not subrogated to claimant's settlement recovery obtained in the civil lawsuit. The Administrative Law Judge reasoned the journal entry of settlement was approved by the district court and the journal entry had designated the settlement for loss of consortium of claimant's wife. K.S.A. 44-504(b) specifically excludes any recovery designated by the court as loss of consortium or loss of services of a spouse from an employer's subrogation interest or lien. Additionally, the Administrative Law Judge pointed out the record contains uncontradicted evidence that the respondent and its insurance carrier had notice of the civil lawsuit and failed to exercise their statutory right to intervene in the lawsuit and protect their interest.

The Appeals Board agrees with the Administrative Law Judge and concludes that respondent's request for a credit against the award in the amount of the \$35,000

settlement between the claimant and the third party defendants in the civil lawsuit is denied.

The Appeals Board finds the Administrative Law Judge has set out in his Award findings of fact and conclusions of law that are accurate and supported by the record. The Appeals Board adopts those findings and conclusions that are not inconsistent with this Order as its own as if specifically set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Administrative Law Judge's Award dated November 24, 1997, should be, and hereby is, affirmed in all respects.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Vincent A. Burnett, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director